Civil Action—No. 16102

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 839, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLEE'S BRIEF

ALLEN, DEGARMO & LEEDY
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United States Court of Appeals
For the Ninth Circuit

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, *Appellants,* vs. Morrison-Knudsen Company, Inc., a corporation, *Appellee.*	No. 16102

Appeal from the United States District Court for the Eastern District of Washington Southern Division

APPELLEE'S BRIEF

PREFACE
and
STATEMENT OF THE CASE

This case presents to the Court for consideration one of the very few instances where a heavy construction contractor has had the courage to seek damages from a Labor Union under the provisions of Section 301 of the Labor Management Relations Act of 1947, otherwise known as 29 U.S.C.A. § 185, or the Taft-Hartley Act.

The facts which caused the institution of this action typify the attitude of many Labor Unions that contracts are only to be regarded as binding upon the employer

or when they are of benefit to the Union. This attitude was directly expressed by Mr. Arthur A. Rossman, Business Agent for the Appellant Operating Engineers, when he testified (Tr. 653):

> "A. I repeatedly stated that I couldn't agree to any settlement that would provide for a cut in take-home pay for my members employed on that project.
>
> Q. You made that statement repeatedly, didn't you?
>
> A. Many times.
>
> Q. That regardless of what the contract said, you weren't going to take any cut in pay?
>
> A. That is right."

It was such an attitude that resulted in the strike by Appellants of the work being performed by Appellee at the Hanford Works Area under Contract with the Atomic Energy Commission, notwithstanding the clear language of Appellants' Contracts with Appellee "that there shall be no strikes."

Although the Statement of the Case as contained in Appellants' Brief is somewhat disconnected and segregated into sections dealing with PROCEEDINGS BEFORE TRIAL, TRIAL OF ISSUE OF LIABILITY and TRIAL OF DAMAGE ISSUE, ENTRY OF JUDGMENT, ETC., we believe sufficient history has been supplied there, throughout the argument in Appellants' Brief and will be supplied hereafter to adequately acquaint the Court with the details which formed the background for the suit out of which this Appeal arose. Because of the limitations of space permitted by the Rules of Court for this Brief, we will rely upon the statement of facts and issues as

presented by the Briefs, upon the Court's own study of the record and later oral argument to supply any further background thought necessary to a full and complete understanding of the issues presented.

SPECIFICATION OF ERROR I

Appellants first seek to avoid the Judgment against them by the ingenious and very technical argument and contention that the Hanford Works Area, where the strike occurred, was not a part of the State of Washington or Benton County and hence not covered by the Contracts relied upon by Appellee. This proposition was more baldly stated in an early "Defendants' Memorandum Brief" as follows:

> "The Hanford Works Project Area is as completely within the exclusive jurisdiction of the Federal Government as is the District of Columbia or the Puget Sound Navy Yard. For legal purposes it is no more a part of Benton Countythan if it were an island of equal size in the Pacific Ocean."

Accordingly Appellants are asking this Court to declare, as a matter of law, that the Hanford Works Area, some 400,000 acres, more or less (Tr. 56), was and is no part of the State of Washington or of Benton County therein for any purpose.

This argument of Appellants and the Specification of Error raising the issue is without merit or substance for a number of reasons:

First, there is not one word of evidence in the record to which Appellants can point to establish that the parties had in mind or contracted in the light of the technical legal point as raised and relied upon by Appellants.

Second, the Contracts themselves expressly negative the idea that they were not intended to cover the Hanford Works Area, regardless of whether it was a Federal enclave, and

Third, the Hanford Works Area is not within the exclusive jurisdiction of the United States as contended by Appellants.

Appellants first seek to convince the Court that the parties to the Labor Contracts, Exhibits 2 and 3, had in mind when they used "Benton County" the alleged differentiation between such County as Appellants claim it existed in 1943 and as they claim it existed in December 1955. This argument assumes that the parties had in mind the tenuous and complicated legal position as advanced by Appellants, but such assumption is neither supported by evidence nor by reason.

To the contrary, Exhibits 2 and 3 refer to Benton County in the same manner as to all other Counties therein mentioned and any doubt as to the intention of the parties is completely erased by the map which forms the center spread of Exhibit 3 to which we direct the particular attention of the Court.

If, as contended by Appellants, the parties had in mind and contracted with respect to the alleged geographical difference between Benton County in 1943 and 1955 it is not too much to assume that they would have specifically excepted from the operation of the Labor Contracts "Hanford Works" as was done with other excepted areas.

But the further and conclusive answer is that Appellants' contention is not legally sound.

It is of importance when considering Appellants' argument that certain dates be kept continually in mind since they bear heavily upon the validity of the issue.

According to the admitted Requests for Admissions, the Hanford Works Area was condemned by the United States in part on February 23, 1943 (Tr. 54) and in part on April 22, 1943 (Tr. 55, 56). It is therefore necessary to look at the Constitutions and Laws of both the United States and the State of Washington as they existed on the dates mentioned, and to examine decisions of Courts as issued prior and subsequent to such dates.

Appellants have called attention to and relied principally upon Article 1, Section 8, Clause 17 of the Constitution of the United States reading:

> "To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;"

Appellants have failed to call to the attention of the Court that which was brought to their attention and that of the Trial Judge by Appellee, that in 1940 there was passed by the Congress of the United States that which now appears as a part of 40 U.S.C.A. § 255 as follows:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the

United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Appellants have also failed to bring to the attention of the Court that which was brought to their attention and that of the Trial Judge by Appellee, that although the Constitution of the State of Washington by Article XXV provided:

"§ 1. Authority of the United States.—The consent of the State of Washington is hereby given to the exercise, by the congress of the United States, of exclusive legislation in all cases whatsoever over such tracts or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dockyards, lighthouses and other needful buildings, in accordance with the

provisions of the seventeenth paragraph of the eighth section of the first article of the Constitution of the United States, so long as the same shall be so held and reserved by the United States. Provided: That a sufficient description by meets and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States: and provided, that all civil process issued from the courts of this state and such criminal process as may issue under the authority of this state against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner, and by the same officers, as if the consent herein given had not been made."

there was passed by the Legislature of the State in 1939 the following, which now appear as RCW 37.04.010, 37.04.020, 37.04.030 and 37.04.040:

37.04.010. Consent given to acquisition of land by United States.—The consent of this state is hereby given to the acquisition by the United States, or under its authority by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired, in this state by the United States, from any individual, body politic or corporate, as sites for forts, magazines, arsenals, dockyards, and other needful buildings or for any other purpose whatsoever. The evidence of title to such land shall be recorded as in other cases. (1939 c 126 § 1; RRS § 8108-1)

37.04.020. Concurrent jurisdiction ceded—Reverter.—Concurrent jurisdiction with this state in and over any land so acquired by the United States

shall be, and the same is hereby, ceded to the United States, for all purposes for which the land was acquired; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to or acquisition by the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant or acquisition, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall revest in this state. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. (1939 c 126 § 2; RRS § 8108-2)

37.04.030. Reserved jurisdiction of state.—The state of Washington hereby expressly reserves such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition. (1939 c 126 § 3; RRS § 8108-3)

37.04.040. Previous cessions of jurisdiction saved. —Jurisdiction heretofore ceded to the United States over any land within this state by any previous act of the legislature shall continue according to the terms of the respective cessions: Provided, That if jurisdiction so ceded has not been affirmatively accepted by the United States, or if the United States has failed or ceased to use any such land for the purposes for which acquired, jurisdiction thereover shall be governed by the provisions of this chapter. (1939 c 126 § 4; RRS § 8108-4)

It is with the background of the foregoing legislation the argument of Appellants must be considered and the authorities cited by them examined and analyzed.

There are further facts which bear upon the subject.

By reference to Exhibit 20 (Tr. 71, 72) it will be found that under date of May 26, 1943, Secretary of War Henry L. Stimson made reference to the Congressional and State legislation heretofore quoted and on behalf of the United States accepted "concurrent jurisdiction" over all lands title of record to which had been acquired by the Government for military purposes within the State of Washington and over which concurrent jurisdiction had not theretofore been obtained. As of the date of such Exhibit title to the Hanford Works Area had not in large part been obtained by the United States. Under date of November 8, 1943, Secretary Stimson addressed a letter to Honorable Arthur B. Langlie, then Governor of the State of Washington, calling attention to the earlier communication of May 26, 1943, and stated (Tr. 73, 74):

> "Under date of May 26, 1943, the United States accepted concurrent jurisdiction over all lands acquired within that state for military purposes, title to which had vested and over which concurrent jurisdiction had not previously been obtained.
>
> The records of this Department indicate that title to a portion of the Hanford Engineer Works had vested in the United States prior to the above acceptance, and that jurisdiction was thus established over such area.
>
> The War Department does not desire to exercise concurrent jurisdiction over this reservation, but prefers that it remain under the jurisdiction of the State of Washington. It is therefore requested that your records be changed to specifically except the Hanford Engineer Works from the above accept-

> ance, and that all interested state officials be notified to the effect that the portion of this reservation covered by the letter of May 26, 1943, should be restored to the jurisdiction of the State of Washington."

By later letters of January 4, 1944 (Tr. 74), and July 31, 1945 (Tr. 77, 78), Secretary Stimson again excepted from any claim of concurrent or other jurisdiction by the United States "all lands comprising the Hanford Engineer Works, which is located in the Counties of Benton, Grant, Franklin and Yakima."

It will thus be seen that the argument of Appellants is without substance or merit. The Congress of the United States, by the passage of 40 USCA Section 255, heretofore quoted, established a *conclusive presumption* that no jurisdiction over lands acquired within the borders of a state had been obtained in the absence of a showing of specific acceptance of such jurisdiction. The record here not only affirmatively establishes that no jurisdiction over the Hanford Works Area was accepted by the United States, but that the acceptance of any jurisdiction was affirmatively refused. Further, under the State law as it existed at the time of the condemnation of Hanford Works Area, no more than "concurrent jurisdiction" could have been obtained in any event, and then only subject to the reservations as set forth in the legislative enactments heretofore quoted.

There are further facts which were before the Trial Court and were significant as demonstrating that neither the United States nor the State of Washington con-

sidered the Hanford Works Area other than a part of Benton County, State of Washington.

From the testimony of Mr. Francis H. Bacon of the Atomic Energy Commission forces, it appeared that all criminal laws of the State of Washington are applicable to and enforced within Hanford Works Area by the Sheriff of Benton County and the Sheriffs of other Counties, within which lie the Hanford Works Area, through their respective Deputies (Tr. 762, 763). He further testified (Tr. 763):

> "A. The authority is entirely the county laws, codes, and regulations, speed limits, traffic regulations. I think I could go on and on and say even beyond the deputies themselves, the sanitary codes and the public health, and so forth, is subject to the same regulations as elsewhere in the counties."

Both civil and criminal laws are enforced within the Hanford Works Area by a Justice of the Peace, who has an office and holds Court within the Area under the appointment of the County Supervisors (Tr. 765).

The schools within the Area are under the Washington State Department of Education, the same as other school districts within the State, and receive their per capita from the State, the same as other school districts (Tr. 766). In this connection, attention is directed to Exhibit 18 whereby the United States Atomic Energy Commission recognized the jurisdiction of the Washington State School System over the Area and provided for funds to support the system in lieu of taxes.

Mr. Bacon further testified that as a resident of the Hanford Works Area he voted in State elections as a resident of the State of Washington (Tr. 768).

The Workmen's Compensation Act of the State of Washington was and is considered as applicable to the Hanford Works Area (Tr. 97-119).

Each and all of these factors conclusively demonstrate that Benton County was considered by all persons and by the United States Government as embracing and including the Area of Hanford Works.

There are two additional facts which were brought to the attention of the Trial Court and to which the attention of this Court should be directed clearly demonstrating that the Hanford Works Area was considered by the parties to this action as being within Benton County and subject to the coverage of the Associated General Contractors of America, Spokane Chapter, Area Agreements, Exhibits 2, 3 and 4.

The first is the admission by Mr. William H. Dunn, Field Representative for the Operating Engineers, Local 370, that during both of the years 1955 and 1956 members of the Local were actually working within the Hanford Works Area for contractors under Contract with the Army Engineers, under the AGC Area Agreements (Tr. 582, 583).

The second is that during 1955 and 1956 the Appellants were claiming and receiving health and welfare payments from Appellee under the Associated General Contractors of America, Spokane Chapter, Area Agreements, Exhibits 2, 3 and 4. There was no provision or basis for such payments except under such Agreements (Tr. 572, 573, 666, 667).

Appellants have admitted and the Court found that Appellee was not a party to the Hanford Works Agree-

ment and in any event it was terminated December 31, 1955. Thereafter the only provisions for health and welfare payments were to be found in Exhibit 2 at page 12 and in Exhibit 3 at page 16.

By 29 USCA § 186, it is provided in part as follows:

"Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment

> benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees * * *."

The only possible written agreement between Appellee, as the employer, and the membership of Appellants, as the "employees," is to be found in Exhibits 2 and 3 and Appellants cannot and should not be heard to claim the benefits of the Agreements as applicable to the Hanford Works Area in order to collect health and welfare payments and at the same time deny their applicability.

We have examined with care each of the authorities as relied upon by Appellants in support of their position and have found none of them contradictory of the position of Appellee that the Hanford Works Area was not different in character in 1955 from that of 1943 and that such Area was a part of Benton County and the State of Washington for the purposes of the Labor Contracts, Exhibits 2 and 3, and the intent and understanding of the parties as evidenced by the language employed therein.

The early cases of *Kohl, et al., v. United States,* 91 U.S. 367, 33 L.ed. 449 (1875) and *Fort Leavenworth R.R. Co. v. Lowe,* 114 U.S. 525, 2 9L.ed. 264 (1884) expressly recognize the principle that the consent of the State to the acquisition of lands by the United States Government might be subject to conditions and reservations as long as the United States in the exercise of its powers would be "free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed." This

principle was further elaborated upon by the Supreme Court in *Collins v. Yosemite Park & C. Co.,* 304 U.S. 518, 82 L.ed. 1502 (1938) in the following language and as indicated by the syllabus from the case as quoted in Appellants' Brief at page 26:

> "The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.
>
> The State urges the constitutional inability of the national government to accept exclusive jurisdiction of any land for purposes other than those specified in Clause 17, § 8, Article 1 of the Constitution. This clause has not been strictly construed. This Court at this term has given full consideration to the constitutional power of the United States to acquire land under Clause 17 without taking exclusive jurisdiction. In that case, it was said: 'Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation'."

In each of *Western Union Telegraph Co. v. Chiles,* 214 U.S. 274, 53 L.ed. 994; *United States v. Unzeuta,*

281 U.S. 138, 74 L.ed. 761; *Arlington Hotel Co. v. Fant,* 278 U.S. 439, 73 L.ed. 447; *Surplus Trading Co. v. Cook,* 281 U.S. 647, 74 L.ed. 1091; *Standard Oil Co. v. California,* 291 U.S. 242, 78 L.ed. 775; *Murray v. Joe Gerrick & Company,* 291 U.S. 315, 78 L.ed. 821; *Pacific Coast Dairy v. Dept. of Agriculture,* 318 U.S. 285, 87 L.ed. 761; *Johnson v. Yellow Cab Transit Co.,* 321 U.S. 383, 88 L.ed. 814; *Yellowstone Park Transp. Co. v. Gallatin County,* 31 F.(2d) 644; *Rogers v. Squier,* 157 F.(2d) 948; *Murphy v. Love,* 249 F.(2d) 783; *Concessions Co. v. Morris,* 109 Wash. 46, 186 Pac. 655, and *Arledge v. Mabry,* 52 N.M. 303, 197 P.(2d) 884, it will be found upon examination that *exclusive jurisdiction* was ceded by the State to the United States reserving only the right to execute process within the ceded area or to tax private property located therein. This distinction and difference immediately renders these cases inapplicable to the instant situation where:

1. Under Federal law it is conclusively presumed that the United States acquired no jurisdiction in the absence of affirmative showing that it accepted jurisdiction over the lands.

2. It affirmatively appears that the United States, through the Secretary of War, refused to accept any jurisdiction over the lands.

3. Under the State law in effect at the time of the acquisition consent was only to "concurrent" rather than "exclusive" jurisdiction in the United States.

It is respectfully submitted that in the light of the applicable Federal and State laws and the circumstances surrounding the condemnation of Hanford Works Area when considered together with the refusal of the United

States to accept any jurisdiction over said lands and the long continued practice of the State of Washington to exercise all rights over said lands, except as inconsistent with the ownership and use thereof by the United States, there is neither factual nor legal merit to the contention of Appellants that Hanford Works Area is not "within the State of Washington" or more specifically within "Benton, Franklin, Grant and Yakima Counties" of said State.

It is further submitted that the acts of the parties to this litigation are inconsistent with the contention that the Contracts, Exhibits 2 and 3, were executed in the light of the technical legal argument as advanced by Appellants.

SPECIFICATIONS OF ERROR II AND VI

Under these Specifications of Error Appellants argue first that they should have been permitted by the Trial Court to vary the terms of the written Contracts, Exhibits 2 and 3, under the guise of showing the circumstances surrounding their execution and second that the evidence established the Contracts were not applicable to the Hanford Works Area.

It is difficult to conceive of two Contracts more clear as to intent of coverage. Under Exhibit 2 (Teamsters) the Territory and Work Covered was defined as follows:

> "ARTICLE II—TERRITORY AND WORK COVERED:
>
> Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties East of the 120th Meridian: Grant, Ferry, Stevens, Pend Oreille, Chelan, Lincoln, Spokane, Adams, Whit-

man, Benton, Franklin, Walla Walla, Garfield, Asotin, Columbia, Okanogan, Douglas, Kittitas and Yakima in the State of Washington; and Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Nez Perce, Lewis, Clearwater and the North one-half of Idaho County in the State of Idaho. It will be noted that Locals 690, 148, 556, 551 and 839 do not have jurisdiction in Kittitas or Yakima Counties even though those counties extend East of the 120th Meridian. Further, that Local 551's territory extends to a line drawn east and west through Riggins and parallel to the 46th Parallel."

Under Exhibit 3 (Operating Engineers) the Territory and Work Covered was similarly defined:

"ARTICLE II—TERRITORY AND WORK COVERED:

Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties east of the 120th Meridian: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima, in the State of Washington; and Benewah, Bonner, Boundary, Clearwater, Kootenai, Latah, Lewis, Nez Perce, Shoshone, and the north one-half of Idaho County, in the State of Idaho."

In an endeavor to overcome this plain and concise language the Appellants sought to show that "Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements described in the plaintiff's original and amended

complaints were being negotiated" (Tr. 25) and that the Contracts, Exhibits 2 and 3, did "not apply and was not intended to apply to construction work to be performed by plaintiff for Atomic Energy Commission" (Tr. 25, 26, 30, 31). No more flagrant or studied attempt to vary the precise language of the Contracts by parol evidence can be imagined.

We deem it advisable to point out to the Court at this point that before ruling upon the Motion to Strike the affirmative matter heretofore quoted, the Trial Court inquired of counsel for Defendants (Appellants) as follows (Tr. 184):

> "THE COURT: Pardon me, Mr. DeGarmo, before you proceed. I think I should inquire as to whether counsel for defendants feel that this section of their affirmative defense adequately states your position. In other words, are you intending to rely on this language in your permanent defense, or do you think you have evidence that will not—
>
> MR. CAREY: I can't speak for Mr. Etter but speaking only for myself we are relying upon the affirmative defense as pleaded in our answer to the amended complaint. There is some variation.
>
> MR. DEGARMO: That is the one.
>
> THE COURT: The one set out here?
>
> MR. DEGARMO: Yes, that is correct. You can check it with your answer as I read it to the Court now.
>
> THE COURT: The thought I had in mind, I don't want to spend considerable time here and have them come in and say, 'We'd like to amend it because we have evidence here that will go beyond.'

If you intend to rely on this it can be determined on this motion.

MR. CAREY: As far as I know, I have no reason to think that we are not going to rely on that as stated.

THE COURT: Is that true of you, too, Mr. Etter?

MR. ETTER: Yes; there is an amended answer for the Engineers. If Mr. DeGarmo is reciting from that affirmative defense we are relying on that, yes."

Accordingly Appellants are precluded from claiming that any evidence not produced would have gone beyond their pleadings.

Before the rule contended for by Appellants can have any application there must first be some reason or basis for "interpretation" or "construction" by the Court. Here there was nothing to be "interpreted" or "construed." To have permitted Appellants to introduce the evidence they sought, would have been to permit them to say that the parties did not mean or intend what they said and would have been a direct violation of the parol evidence rule.

The following excerpts from American Law Institute Restatement of the Law of Contracts establish the applicable law:

"§ 230. Standard of Interpretation Where There Is Integration.

The Standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent per-

son acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean.

Comment:

a.* * * But oral statements by the parties of what they intended the written language to mean are excluded, though these statements might show the parties gave their words a meaning that would not otherwise be apparent. Such a common understanding may justify reformation, but cannot be the basis of interpretation of an integration.* * *

b. Where a contract has been integrated the parties have assented to the written words as the definite expression of their agreement. In ordinary oral negotiations and in many contracts made by correspondence the minds of the parties are not primarily addressed to the symbols which they are using, but merely to the things for which the symbols stand. Where, however, they integrate their agreement they have attempted more than to assent by means of symbols to certain things. They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have."

The following cases from the Supreme Court of the State of Washington support and illustrate the rule: *Brunswick-Balke-Collender Company v. Seattle Brewing & Malting Company,* 98 Wash. 12, 167 Pac. 58; *Vance v. Ingram,* 16 Wn.(2d) 399, 133 P.(2d) 938; *Tube-Art Display, Inc. v. Berg,* 37 Wn.(2d) 1, 221 P.(2d) 510; *Truck-Trailer, Etc. v. S. Birch Etc. Co.,* 38

Wn.(2d) 583, 231 P.(2d) 304; *Jackson v. Domschot,* 40 Wn.(2d) 30, 239 P.(2d) 1058; *Preugschat v. Hedges,* 41 Wn.(2d) 660, 251 P.(2d) 166; *Nelson Equipment Co. v. Goodman,* 42 Wn.(2d) 284, 254 P.(2d) 727.

It is also well established law that parol evidence will not be admitted to create an ambiguity where none in fact exists.

> *Washington Etc. v. Halferty Etc.,* 44 Wn.(2d) 646, 269 P.(2d) 806;
>
> *Schwieger v. Robbins & Co.,* 48 Wn.(2d) 22, 290 P.(2d) 984.

In line with the foregoing authorities the Trial Court expressed his views thus (Tr. 189):

> "There isn't here any contention, as I get it there was a mutual mistake, that the plaintiff also was mistaken and thought he wasn't dealing with Benton County. That, I assume, could not be established, I mean that the plaintiff was mistaken and thought he was not dealing with the Hanford Works or the contract was not to cover the Hanford Works.
>
> It seems to me that here would be bringing evidence to show that while the contract was made to cover Benton County by plain terms, by implication by exclusion of other areas that were not to be included in other counties, and by the maps attached, all indicate that the parties were dealing with Benton County as a geographical unit, as a county, and certainly nobody would have any doubt as to what Benton County, Spokane County or any other county means so far as its covering a particular area is concerned.
>
> I also have in mind that in matters of this importance the parties here, Morrison-Knudsen, these

> Local and International Unions, Joint Council of Teamsters, are not like a grocer or a couple of grocers getting together and making a contract without the benefit of counsel or with perhaps counsel who is employed on the spur of the moment. These people are well represented. They have adequate legal staffs and legal representation.
>
> They certainly knew, as everyone knows, what the situation was with reference to the Hanford area and if they did not intend to, if they intended it should be excluded from this contract it seems to me that the lawyers on one side or the other would have spelled it out in plain English and said so."

To foreclose any claim by Appellants of mutual mistake the Trial Court inquired of counsel for Appellants as follows (Tr. 190, 191):

> "THE COURT: It would still be the unexpressed intention of the parties contrary to the contention as I see plainly expressed in the instrument. I gather that you are not claiming the legal defense of mutual mistake?
>
> MR. ETTER: No, we don't say mutual mistake."

It is respectfully submitted that under the authorities and clear, concise and unambiguous Contract provisions there was no basis or reason for the introduction of evidence only calculated to violate the parol evidence rule.

Specification of Error VI relates solely to the claim that the Court should have permitted Mr. Sam Guess and Mr. Arthur Rossman to testify that when the two Contracts, Exhibits 2 and 3, were being negotiated it was specifically agreed that construction work within

the Hanford Area was not within the scope of the negotiation (Appellants' Brief page 41). There are several reasons why this testimony was properly excluded.

First of these was that no such "agreement" was pleaded as a defense.

Second, the Statement of Error appearing at page 41 of Appellants' Brief is not in accordance with the offer of proof.

Third, the offer was clearly an attempt to vary the plain, unambiguous, clear and concise language of the written Contracts resulting from prior negotiations.

We are somewhat at a loss to know just what is the basis for the argument appearing on pages 37-41 of Appellants' Brief, but it is apparently tied in with Appendix II in some manner upon the theory that the evidence established the Contracts, Exhibits 2 and 3, were not applicable to Hanford Works Area.

We have already pointed out, in answer to Specification of Error No. I, that Appellants had expressly recognized the applicability of the two Contracts to the Hanford Works Area by working thereunder and by receiving health and welfare payments thereunder as the only basis for such payments. Further the testimony relied upon fails to establish any inapplicability of Exhibits 2 and 3 to the Hanford Works Area.

Parenthetically, although Appellants at page 36 of their Brief indicate that Appendix II is a "statement of events from December 31, 1946 to May 8, 1956" we wish to dispute this assertion. Not only is the "statement" incomplete and not keyed to or supported by the

Transcript, in the large part, but it is also largely argumentative and Appellants' own interpretation of the facts.

On several occasions in Appendix II Appellants make the assertion that Exhibit 4, being the September 1, 1950 Labor Contract between the Associated General Contractors of America, Inc., Spokane Chapter, and several Local Unions, including Operating Engineers, Local 370, and Teamsters Local 839 "was never applied to construction work within the Hanford Atomic Energy project" (Appendix II pages 81, 83, 86) or "had no application whatever to work within the Hanford Area." These statements are misleading and incorrect.

Mr. Sam C. Guess, Executive Secretary of the Spokane Chapter of the Associated General Contractors of America, testified specifically that the Hanford Works Area was within the area of jurisdiction of such Chapter in 1955 and 1956 (Tr. 316). He further testified that prior to Morrison-Knudsen Company, Inc. becoming a member of the Spokane Chapter in 1955 he had no knowledge of any member working in the Area (Tr. 322). Accordingly the question of the inapplicability of the September 1, 1950 Labor Contract to the Hanford Works Area was never raised insofar as the record in this case discloses and the statements of Appellants previously mentioned are merely conclusions on their part without supporting proof.

Much of Appendix II is given over to a discussion of the activities of Kenneth M. McCaffree. Suffice it to comment that Mr. McCaffree admitted that Appellee never signed the Hanford Works Agreement or was rep-

resented by the Hanford Contractors Negotiating Committee (Tr. 729). Upon this point we also wish to direct the attention of the Court to Finding of Fact VI, where appears the following (Tr. 133):

> "That each of Defendants Teamsters Local 839 and Operating Engineers Local 370 became a signer of and a party to said Labor Agreement commonly known and referred to as the 'Hanford Works Agreement,' and although certain contractors having contracts with the Atomic Energy Commission during the years 1952 to 1955, both inclusive, became signers of said Agreement the Plaintiff never signed said Hanford Works Agreement or authorized the Hanford Contractors Negotiating Committee to negotiate for or represent it."

Further at page 47 of Appellants' Brief appears the statement:

> "The Appellants do not claim that Doctor McCaffree did have any authority to speak for or bind Appellee."

In view of the testimony, the foregoing Finding by the Court and Appellants' admission little else need be said concerning Mr. McCaffree's activities.

There are, however, two factors mentioned in Appellants' Appendix II which are not there emphasized or given proper significance.

One of these is the provisions of Article VIII of Exhibit 2 and Article IX of Exhibit 3, which are headed identically and are largely identical (Quotation following is from Exhibit 2):

> "ARTICLE VIII—OTHER EMPLOYERS AND SUBCONTRACTORS:

Section 1. As an assurance that all contractors operating in the territory covered by this Agreement will be subject to the same employment conditions, the Unions agree that no member workmen will be furnished any Employer under conditions more favorable to the Employer than those herein established.

Section 2. The Employer agrees that all conditions outlined herein shall be adhered to by Sub-Contractors, (also Owner-Operators).

Section 3. There shall be no special job agreements."

The Section 3 was new in the 1956-1957-1958 Agreements (Tr. 376) and was inserted at the request of the Unions in accordance with their desire to get Area Agreements applicable to all jobs in the State whether large or small. It was in accordance with this paragraph that the Hanford Works Agreement, which constituted a "Special Job Agreement" was terminated on December 31, 1955 (Tr. 134). Upon the termination of such "Special Job Agreement" all provisions thereof likewise ceased to have any force and effect, except as specifically contained in and covered by the Area Agreements, Exhibits 2 and 3.

That Appellants not only recognized the reason for and effect of the "no special job agreements" provision but claimed rights thereunder was conclusively demonstrated by the testimony of Mr. Lee E. Knack, Labor Relations Director for Appellee, which appears at pages 208-209 of the Transcript. Appellee had, prior to January 1, 1956, entered into a "Special Job Agreement" covering work being performed at the Chief

Joseph Project within the area of coverage of Exhibits 2 and 3 and which work continued on into the year 1956. Mr. Knack testified concerning a meeting held in January of 1956 at which there were in atendance Mr. Rossman and Mr. Hollingsworth on behalf of the Operating Engineers and Mr. Don High on behalf of the Appellant Teamsters, as follows (Tr. 208, 209):

"Q. Now referring to this meeting which I think you stated was held on the 5th of January, 1956, will you state whether either or both of Exhibits 2 and 3 were a subject for discussion at that time and as related to work of Morrison-Knudsen Co.?

A. I don't remember the exact date of the meeting. I didn't mention that it was January 5, 1956, but it was early in January of '56.

Q. Early in January?

A. Yes, these specific agreements were part of the discussion in that the provision written into the agreement which prohibited project agreements was mentioned and applied directly in relation to our Chief Joseph project, which the purpose of the meeting had been called for, and I was informed that the project agreement could not apply and it would be necessary for these two agreements to apply until the job was completed for the seven or eight months that was involved.

Q. Were the two representatives from the Operating Engineers and the one from the Teamsters that you mentioned present at this meeting?

A. They were present. However, there were others who were present, too, who my memory doesn't permit me to recollect.

Q. What, if any, contention was made at that time, Mr. Knack, that these agreements were not

binding on Morrison-Knudsen Co.? I am referring to Plaintiff's Exhibits 2 and 3.

A. None whatsoever.

Q. Is there any contention that they were binding?

A. Yes, sir.''

The above testimony stands undisputed in the record. Appellants are thus in the position of having asserted rights against Appellee under the Contracts, Exhibits 2 and 3, and at the same time now refusing to be bound by such Contracts.

For all of the reasons heretofore mentioned and upon the legal grounds as established by the authorities cited Specifications of Error II and VI are without merit or substance.

SPECIFICATION OF ERROR III-A

Appellants seek to avoid the Judgment in this action by the claim that since Appellee's signature does not appear upon the Contracts, Exhibits 2 and 3, it is not a party thereto.

We have alluded to the fact that Appellants, long prior to the strike on March 22, 1956, and in early January of that year, not only recognized Appellee as a party to such Contracts, but asserted rights against it thereunder in connection with Chief Joseph Dam.

We have also heretofore made mention of the fact that Appellants collected from Appellee health and welfare payments for their members upon the wages earned upon Hanford Works Project and continued to so collect such payments until the completion of Appel-

lee's work. This could not have been done legally except under the provisions of Exhibits 2 and 3.

For the above reasons alone, Appellants should not be heard to deny that Appellee was a party to the Agreements. But there are additional facts which establish Appellee as a real party in interest to the Contracts, Exhibits 2 and 3.

It is immediately self evident that Associated General Contractors of America, Inc., Spokane Chapter, did not negotiate the Contracts for its own benefit. It imployed no Teamsters or Operating Engineers as to which the Contracts could in any manner become applicable. The Contracts are meaningless unless it be considered that the Associated General Contractors of America, Inc., Spokane Chapter, in the negotiation and signing of the Contracts acted for and as agent of its members.

That the Associated General Contractors of America, Inc., Spokane Chapter, was actually appointed and designated the agent of Appellee appears affirmatively from the record. Morrison-Knudsen Company, Inc. became a member of the Spokane Chapter in February of 1955 (Tr. 196, 346). Mr. Lee E. Knack, Labor Relations Director of Appellee, testified (Tr. 198):

> "But upon joining the Chapter in February of 1955, all of Morrison-Knudsen Co.'s bargaining rights for work with the exception of that work which we were performing at Chief Joseph Powerhouse, all of the bargaining rights with the exception of that project were invested and turned over to the AGC, Spokane Heavy and Highway Chapter. We retained our bargaining rights on Chief Joseph Powerhouse because we had a project agree-

ment which was written for the duration of the project, and, therefore, we retained it. It was actually written in rather peculiar fashion in that it, it was for the duration of the project or until Chief Joseph Builders, which was another contract on the dam part itself, completed their work, whichever occurred earlier."

There accordingly appears the direct delegation of agency to the Associated General Contractors of America, Inc., Spokane Chapter, to negotiate Labor Contracts covering the area in question.

That a principal can enter into a binding contract through an agent and by the agent's signature is well established by the following authorities:

Restatement of the Law of Agency 2d, § 292:

"The other party to a contract made by an agent for a disclosed or partially disclosed principal, acting within his authority, apparent authority, or other agency power, is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract."

Freeman v. Navarre, 47 Wn.(2d) 760, 289 P. (2d) 1015;

First Nat. Life Assur. Soc. v. Farguhar, 75 Wash. 667, 135 Pac. 619;

Crane v. United States, 55 F.(2d) 734.

Based upon the facts as appearing in the record in this case, as in part heretofore related, and the foregoing authorities, the Court made and entered Finding of Fact V, which in the part material to this Specification of Error reads (Tr. 129, 130):

"That in February of 1955, the Plaintiff became and has at all times since been a member in good standing of Associated General Contractors of America, Inc., Spokane Chapter, and as such member Plaintiff assigned and delegated to said Associated General Contractors of America, Inc., Spokane Chapter, its bargaining rights covering all employee members of Teamsters Local No. 839 and of Operating Engineers Local No. 370 as employed by Plaintiff engaged in Heavy, Highway and Engineering Construction work within the Territory as covered by the Labor Agreements negotiated by said Associated General Contractors of America, Inc., Spokane Chapter. Pursuant to such delegated authority and on behalf of Plaintiff, as one of its members, and for the account and benefit of Plaintiff the Associated General Contractors of America, Inc., Spokane Chapter, as of December 19, 1955, negotiated and entered into a Labor Agreement with Teamsters Local 839, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit "A," and a copy of which was introduced in evidence herein as Plaintiff's Exhibit 2, and under date of December 24, 1955, negotiated and entered into a Labor Agreement with Operating Engineers Local No. 370, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit "B," and a copy of which was introduced in evidence herein as Plaintiff's Exhibit 3."

It is submitted this Finding is amply supported and justified.

Appellants also seek to rely under this Specification of Error upon *Ketcher v. Sheet Metal Workers,* 115 F. Supp. 802, as establishing the proposition that under

the Taft-Hartley Act an employer member of an Employers Association which did not physically affix its signature to a Labor Contract negotiated on its behalf by such Association cannot maintain an action for breach. As counsel for Appellants admit, this case was called to the attention of the Trial Court and failed to receive his favorable consideration. When the reasoning of the United States District Court for the Eastern District of Arkansas, Western Division, upon which the decision was based, is considered the wisdom of the Trial Court's refusal to follow the holding in the *Ketcher* case, *supra,* is apparent. The basis of the *Ketcher* decision is set forth in the following quoted language therefrom:

> "It has been uniformly held in the comparatively few cases in which the question has arisen that individual employees may not maintain a suit under Section 185(a); United Protective Workers of America v. Ford Motor Co., 7 Cir., 194 F.2d 997; Schatte v. International Alliance, etc., D.C. Cal. 84 F.Supp. 669; Brooks v. Hunkin-Conkey Construction Co., D.C. Pa., 95 F.Supp. 608. As stated, we see no distinction between an employee who is a member of a labor union and an employer who is a member of an employer's association as far as the right to sue under Section 185(a) is concerned, and while we are not bound by the decisions just cited, we do not feel justified in refusing to follow them, particularly since one of them was rendered by a Federal Appellate Court; moreover, no case holding to the contrary had been cited to us, and we have found no such case."

When the decisions holding that an individual member of a Labor Union may not maintain an action

against the employer for breach of the Labor Contract under the Taft-Hartley Act are considered, it immediately appears that the reasoning of the Court that there is "no distinction" between such an action and one by the employer against the Labor Union immediately appears as a *non sequitur* and if followed would defeat the entire purpose of the Taft-Hartley Act.

The identical question raised by Appellants in this case was also raised by the Union in the case of *Farina Bros. Co. v. United Brotherhood of Carpenters* (D.C. D. Mass.) 152 F.Supp. 423, in reliance upon the *Ketcher* decision. The Court refused to follow *Ketcher* as illogical and instead stated:

> "Defendant refers to the fact that an individual employee member of a union may not sue under § 301. Both as a matter of statutory interpretation and legislative history, I fail to see the force of the analogy. In the ordinary course it is intended that an employer may sue. Where a number of employers in association and the union have bargained jointly, it must be apparent that the employer association is strictly not an "employer" at all. The association may have, at most, a few skeleton employees. It is not for them that it bargained. The terms of the agreement above quoted make clear that each member of Associated was regarded a separate employer. If anyone is unable to sue I think it more possibly Associated.
>
> The union argues that its individual employees cannot sue under the Act, and that since one of its intents is mutuality, individual members of an association of employers should be ruled to be equally disabled. This overlooks substantial differences between individual employers and individual em-

ployees. Normally individual employers may sue. Nor should it be said that they must sacrifice that right because the Board has certified that they may bargain collectively. A suit which could assert only a joint injury to all of the employers would be of very limited utility. If the situation were reversed, could it be thought that the union, by bargaining collectively with a so-called multi-employer (an inaccurate, and correspondingly confusing term, the correct term being multi-employer association), surrendered its right to sue an individual employer for an improper lock-out not participated in by the others? *Cf. Rabouin v. National Labor Relations Board,* 2 Cir., 195 F.2d 906. I believe there were here, in effect, several contracts, whether the individual employers signed or not, and that no disability resulted from the manner they were arrived at. The motion to dismiss is denied."

Specification of Error III-A is without factual or legal foundation or support and should be disregarded.

SPECIFICATION OF ERROR III-B

By this Specification the Appellants seek to claim the benefit of some alleged "agreement" on the part of Appellee through its Labor Relations Director, Lee E. Knack, to continue the payment of "isolation pay" and to furnish "bus transportation" for the life of the Hanford Works Project and then contend that the ceasing to furnish bus transportation by Appellee constituted a "lockout" of Appellants' members. Such claim and contention was denied by the Trial Court, who specifically passed thereon in Finding of Fact VIII, as follows (Tr. 135, 136):

"That although the Defendants Teamsters Local

No. 839 and Operating Engineers Local No. 370 pleaded by way of trial amendment and as an Affirmative Defense that:

'At the time of the commencement of work Plaintiff agreed with the Defendants Local 839 and 370 that said Hanford Contract should apply to said job until completed and although termination notice of said Contract was made on December 29th the terms of said Contract were applied until after March 20, 1956.'

the Court finds with respect to said Affirmative Defense that no part thereof was established by the evidence introduced in this cause and further specifically finds that there was no Agreement made as pleaded and that any statement or statements claimed by witnesses for the Defendants to have been made by Lee E. Knack, Manager of Labor Relations for Plaintiff, at a meeting held in Pasco, Washington, on January 5, 1956, were not made as a contractual commitment on behalf of Plaintiff to any party to this action, or were said statement or statements, if any, in any manner relied upon by the Defendants or their membership."

As will be seen by the foregoing Finding of Fact, the Appellants are seeking by this Specification of Error to raise a controversial issue of fact. In this attempt they are first faced by the provisions of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A. reading as follows:

"Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or re-

> fusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

As stated by this court in *Bjornson v. Alaska S.S. Co.* (9th Cir. 1951) 193 F.(2d) 433:

> "It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence. * * * "

These same views were reiterated by the Court in *Gamewell Company v. City of Phoenix,* 216 F.(2d) 928 and *Carr v. Yokohama Specie Bank, Limited,* 200 F.(2d) 251. There are many similar authorities from this and other Circuits to the same effect.

The attention of the Court is also directed to the fact the claim and contention of Appellants is a direct contradiction of their Answer to Appellee's Requests for Admissions whereby Appellants answered (Tr. 88, 231):

> "Request 13—Answering Request 13 defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839; Joint Council of Teamsters No. 28 and Western Conference of Teamsters admit that the contract in force prior to January 1, 1956, and applicable to the Hanford area, was cancelled as of December 31, 1955, by notice given by Hanford Contractors Negotiating Committee through Kenneth M. McCaffree, its executive secretary, *and that no substitute contract became effective relative to said area between January 1, 1956, and the date of the*

> *work stoppage, referred to in plaintiff's amended Complaint,* and these defendants deny that the contract attached to plaintiff's amended complaint as Exhibit "A" had or has any application to work to be performed within the Hanford area." (Emphasis supplied).

Before the testimony upon which Appellants rely and as related "in abstract" in Appendix IV was admitted in evidence Appellee objected thereto upon the ground that the claim and contention of Appellants constituted an affirmative defense not pleaded (Tr. 226, 227, 233, 294) and such objection was saved and preserved by a continuing objection (Tr. 236). It is submitted this objection was proper, the overruling thereof was error and this Court should not consider any contention of Appellants based thereon.

It further appears that Appellants are now seeking to use the testimony for purposes other than that for which it was admitted by the Court over Appellee's objection. The Court stated as the basis for its ruling (Tr. 236):

> "THE COURT: Well I think that counsel will be permitted to show, if he can, or inquire at least along the line of showing that this contract which, or these contracts, rather, which are in evidence as Plaintiff's 2 and 3, were not actually used or applied to Hanford Works which is the basis of this suit."

The contention of Appellants, as stated at page 88 of their Brief, that:

> "At the Pasco meeting in the afternoon Mr. Knack definitely committed the Appellee to a continuance of isolation pay and bus transportation"

is hardly consistent with the ruling of the Court that the evidence might be received to show that Exhibits 2 and 3 "were not actually used or applied to Hanford Works."

Lastly and as a conclusive answer to Appellants' contention and claim and as found by the Trial Court, the testimony does not support Appellants or contradict the Finding of the Trial Court.

We can see no benefit in attempting to point out the many particulars in which Appellants' Appendix IV, which purports to be an ABSTRACT OF EVIDENCE CONCERNING COMMITMENT TO CONTINUE ISOLATION PAY AND BUS TRANSPORTATION MADE BY LEE J. KNACK, APPELLEE'S DIRECTOR OF LABOR RELATIONS AT PRE-JOB CONFERENCE HELD AT PASCO ON JANUARY 5, 1956, is inaccurate and incomplete. It is sufficient to direct the attention of the Court to the fact it is incomplete in at least two most important particulars.

Appellants seek to claim a "commitment" as the result of a question asked Mr. Knack by one Charles J. Knapp. Mr. Knapp was, at the time in question, Union representative for Plasterers and Cement Finishers (Tr. 470). He was also Secretary of the Pasco-Kennewick Building Trades Council. Although he testified that he had been selected as spokesman for the Teamsters, Operating Engineers and Cement Finishers (Tr. 482) he admitted that this agency had not been disclosed to Mr. Knack (Tr. 526, 527) and that there were present at the meeting Mr. William H. Dunn and Mr. Rossman of the Operating Engineers (Tr. 524) and possibly a representative of the Teamsters (Tr. 524). Further, and

although Mr. Knapp testified voluntarily and directly upon his direct examination that his inquiry of Mr. Knack was "after the general meeting" (Tr. 479) and that his inquiry was "for the people that I represented" (Tr. 479), he did not assert that he was representing the Teamsters and Operating Engineers until an objection had been made in his presence as to the binding effect of his testimony as between Appellee and Appellants (Tr. 480) and on cross-examination, when it appeared his inquiry had not been a part of the general meeting, he endeavored to change his testimony as follows (Tr. 525):

> "Q. Now, when you originally testified on this matter, Mr. Knapp, did you state that this meeting or the discussion with Mr. Knack was after the general meeting?
>
> A. I did say that and I should have described it in a different way. The general discussion or the pre-job conference, that business was over and then that is when I approached Mr. Knack with the questions in reference to isolation pay and bus transportation.
>
> Q. As a matter of fact, you didn't correct your testimony in that respect until after I had made an objection, isn't that true, pointing out that you had stated that the conversation was after the general meeting?
>
> A. The meaning was the same, but the words that I used were wrong, sir. It doesn't change the fact of when it actually happened."

The unreliability of the witness and his self interest was apparent to the Trial Judge.

Of paramount importance, however, was the testi-

mony of Mr. Knapp that Mr. Knack made no "commitment" as to how long Appellee would pay isolation pay and furnish bus transportation (Tr. 527, 528).

The testimony of Mr. Lee E. Knack concerning the pre-job conference of January 5, 1956, is to be found in its entirety upon pages 240-246, 270-283, 294-296, 700-718, of the Transcript. That of William H. Dunn appears at pages 556-560, 562-566. Mr. Arthur A. Rossman's version appears at pages 612-616, 621-622. One Harold Edward Clary presented his version at pages 670-672 of the Transcript. Rather than presenting our own "abstract" of such testimony, as counsel for Appellants have attempted to do in Appendix IV, we prefer to let the Court read the actual statements of the witnesses in the light of the Trial Court's comments thereon, as follows (Tr. 782-784):

> "Now, certainly the burden, whether it is strictly affirmative defense—I think it is, and it has been pleaded as an affirmative defense—but certainly the burden would be upon the defendants to show that there was another contract and necessarily, under the proof here, a subsequent oral contract.
>
> Now, what oral contract was there that superseded or modified or changed this written contract which the Court has held by its terms applied to all of Benton County? The only possible one that I can see here would be the oral contract made by the announcement of Mr. Knack at the afternoon meeting of January 5, 1956.
>
> Now, it seems to me that for a court to hold, that under the circumstances there, with the background, and considering the relation of the parties and what they are doing, what they were attempting

to do, it would be extremely unrealistic for a court to say that that was a contract to govern the terms and conditions of labor of these unions on a million, eight hundred thousand dollar construction job.

The statement wasn't even made in response to any question asked by any representative of these defendant unions. Mr. Knapp, who asked the question, and it was, the evidence shows, almost an afterthought, the question was asked toward the close of the meeting after most of the discussion had terminated, Mr. Knapp, who doesn't represent either of these unions here, defendant unions, asked this question and got the answer in response. It doesn't seem to me that the Court could logically hold that these experienced business representatives of these unions, who certainly are capable, knew what they were doing, would rely upon a statement made in response to a question asked by somebody else, an oral statement made, as governing the terms and conditions of their members' work on this big contract. Certainly, they would have said, 'Well, does that apply to my union? Will you give us a letter of confirmation on this so that we will be in accordance with the terms of the Taft-Hartley Act as to health and welfare payments and contributions?

It just seems to me that the parties would not and, as a matter of fact, I think the situation is clearly here that they were not, relying upon that oral contract. They weren't there to make an oral contract; they weren't relying upon it. Their position was and has been that the written A.G.C. contract didn't apply to this job on the Hanford area. That is what the union members thought, that was their position, and that was counsel's position, and, unfortunately, the Court has taken a different view and deprived them of that defense.

> Now, it logically follows, of course, that if there was no modifying contract, then this contract did apply and was breached by the unions in failing to abide by the grievance procedures which were outlined in the contract."

A further significant fact is that Mr. Arthur A. Rossman, Business Agent for Appellant Operating Engineers, testified as follows (Tr. 647):

> "Q. Are you relying on the statements made by Mr. McCaffree in his letter of December 29th, which terminated the Hanford Works Agreement, or are you relying on the statement which you say Mr. Knack made in the January 5th meeting?
>
> A. Neither one of them.
>
> Q. Neither one of them? A. No."

Specification of Error III-B is without merit for the reasons, first, the claimed "commitment" is contradictory of Appellants' admission that "no substitute contract became effective relative to said area between January 1, 1956, and the date of the work stoppage"; second, all testimony in support of the "commitment" was erroneously admitted by the Trial Court over the preserved objections of Appellee that no such defense was pleaded, and that it violated and was contradictory of Appellants' Answer to Request for Admission; third, the Findings of the Trial Court are not shown to be erroneous under Rule 52 of this Court heretofore quoted; and fourth, the alleged "commitment" was not established in fact or relied upon by Appellants.

SPECIFICATION OF ERROR III-C

By this Specification Appellants make the unique

argument that it was Appellee which breached the Labor Contracts rather than they.

We say the argument is "unique" because it was presented for the first time by APPELLANTS' POINTS ON APPEAL. There was no pleading presented to the Trial Court tendering the issue, or was there proposed by Appellants any Finding of Fact or Conclusion of Law in support of such contention. The matter stands therefore in the category of a defense raised for the first time in the Appellate Court.

Under the Federal Rules of Civil Procedure, Rule 12(h) (28 USCA) it has been uniformly held by this Court, as well as by the Courts of other Districts, that it is not permissible for an Appellant to rely upon an Assignment of Error not called to the attention of the Trial Court where the matter does not concern the jurisdiction of the Court. *Century Furniture Co. v. Bernhard's, Inc.* (USCA 9th) 82 F.(2d) 706; *Maloney v. Brandt,* (USCA 7th) 123 F.(2d) 779; *Sorenson v. United States,* (USCA 9th) 226 F.(2d) 460.

Even though it be conceded, however, that Appellants are entitled to raise such an issue as a defense in this Court for the first time, the point is without merit or substance under the facts as established by the record.

The testimony is quite clear and emphatic that at all times up to and including the trial of this action upon the issue of liability Appellants refused to recognize that Exhibits 2 and 3 were in any respect applicable to the Hanford Works Area. The pleadings are likewise in accordance with this position and contention of the Ap-

pellants and Appellants have based their appeal to this Court largely upon the same claim and contention.

It is ridiculous to assume that under such conditions any offer to arbitrate by Appellee would have been given favorable consideration.

It is not necessary, however, to rely upon assumptions. Mr. Sam C. Guess, Executive Secretary of the Spokane Chapter of Associated General Contractors of America, Inc., testified that at a meeting held at Spokane, Washington on March 16, 1956, in the Federal Court House, the following occurred (Tr. 333-337):

> "Q. All right, what did you do in a further endeavor to reach some agreement, and again I am referring to only direct contacts had by you with the two unions with which we are interested, the Teamsters and the Operating Engineers or their representatives?
>
> A. We offered to arbitrate under the disputes clause of the agreements reached in Exhibits 2 and 3, and we were told that the members present could not give us an answer at that time.
>
> Q. Now, let's find out what meeting that was that offer was made and who were present, if possible?
>
> A. That offer was made on March 16th, at which time Mr. Al Crowder of the Teamsters, Mr. Sewell Davis of the Teamsters, Arthur Rossman of the Engineers, R. Davis of the Engineers, B. C. Fulton of the Engineers, William Dunn of the Engineers, R. L. Hollingsworth, Engineers; Charlie Knapp, Cement Masons; Max Sather, Carl Carbon, George Sebeck, Al Halvorson, Cham Helvey, Sam Guess, and Mr. Mack Reynolds for management, and Mr. McCaffree—he was the Executive Secretary—Mr.

Bacon, Mr. Rutt, Messrs. Peterson and Zeman of the Federal Mediation and Conciliation Service.

Q. You say that was an offer to arbitrate?

A. That was an offer to arbitrate.

Q. And what response, if any, did you get to that offer?

A. We were told by Mr. Davis of the Teamsters that he would have to clear through his legal department in Seattle before he could go further on arbitration.

We were told by Mr. Rossman that he wanted an opportunity to consult legal counsel."

* * *

"Q. Now, at some later date, did you receive a definite word from either of these gentlemen or from representatives of their organizations as to the request that they arbitrate under the arbitration provisions of the A.G.C. agreements?

A. On March the 21st, another meeting in mediation, attended by both Mr. Peterson and Mr. Zeman, Mr. Zeman doing most of the mediation, was held, and at that time Mr. Rossman of the Engineers, Mr. Bill Dunn, Mr. Sewell Davis, Mr. Charlie Knapp, were present. Management was represented by Mr. Sather, Mr. Helvey, Mr. Carbon, Mr. McReynolds, and Mr. Guess.

Q. What occurred at that time?

A. Mr. Davis stated that he had not been able to talk to his attorney, Mr. Sam Bassett, and that they had talked to one of the assistants, and the Teamsters refused to arbitrate the issues at Hanford because of several reasons. He stated one of the reasons was that it was doubtful that it is legal for a new agreement to be arbitrated.

Mr. Rossman stated that he had thoroughly talked it over with his attorney and, because management had transferred their bargaining rights, it did not necessarily establish the Area agreement on the project, and since the Hanford contractors have negotiated the area agreements for a number of years, he felt that they should continue to do so, although in the face of admitting that the Hanford Area agreement had been cancelled.

Q. Well, now, after the refusal of both the unions to arbitrate as to some arrangement, what was done?

A. A great deal of discussion took place during the remainder of the morning and, after a caucus or luncheon break, the full meeting resumed and the chairman of the Spokane Chapter, Mr. Sather, stated that he felt that we had made labor a fair proposition and that they should take the matter back to their people and they should go to the A.G.C. agreements and arbitrate their grievances, with the understanding that any benefits given by the arbitrator would be retroactive to the time that the arbitration began. Mr. Rossman stated of necessity he must take it back to his people, and Mr. Davis stated that, 'I think you have a work stoppage on your hands. Our people will not work.'

And it was again asked that if they didn't think it was a fair thing, to arbitrate the matter, and Mr. Davis answered, 'No, that would be the simplest thing in the world to me. These people told us that they are just not going out there when the busses are off.' And it was after that that the meeting was adjourned. Mr. Zeman made the closing remarks, a very brief summary, and the meeting came to a complete impasse and was adjourned.

Q. Was anything said at that meeting as to when

the absolute terms of the A.G.C. agreement would be made effective there?

A. It was stated several times during the meeting that there was no other agreement under which people could work; that a considerable number of the local unions had gone under Area agreements, the Hanford Works Agreement had been terminated, and for that reason they would either work under the A.G.C. agreement or there was no agreement to work under, * * *

Q. What occurred there then after this meeting? You say that the meeting of March 21st ended in an impasse; what occurred then?

A. There were no busses on the job the next day, and, to my knowledge, no one but—well, the crafts involved did not work, Mr. DeGarmo. I understand that through telephone conversations with the area, with Mr. Thurston of the A.E.C. and with the project manager on the job."

See also pages 396-397 of the Transcript where Mr. Guess further testified:

"Now, in your testimony yesterday you mentioned some offer to arbitrate or mediate this matter of the dispute?

A. We did, sir.

Q. And was that under the agreement of Article 9 as far as the Teamsters' contract was concerned?

A. Yes, sir, and under Article 10 of the Engineers' agreement.

Q. There is a similar provision in the Engineers' agreement, which is Exhibit 3?

A. That is correct.

Q. And what happened with respect to that offer?

A. We were told by Mr. Sewell Davis of the Teamsters that they would not arbitrate. We were also told by Mr. Rossman that he could not arbitrate."

The law is quite clear that a party will never be required to perform a useless act to comply with some alleged condition to suit. 1 C.J.S. 1070 §27(5)d.; 1 Am. Jur. 428 §36.

Here the record is clear and unequivocal that there was made a definite offer of arbitration to Appellants which was considered by them and rejected.

Appellants have endeavored to assert that the work stoppage resulted from a "lockout" because of the failure of Appellee to furnish free bus transportation to Appellants' members on March 23, 1956. We believe it should be stressed at this point that the furnishing of bus transportation had never been a contractual responsibility of any employer at Hanford Works Project. This fact was agreed upon by all witnesses: Sam C. Guess (Tr. 319), Charles J. Knapp (Tr. 520), William H. Dunn (Tr. 562).

In the light of such testimony, it is submitted the discontinuance of a non-contractual and voluntary service could hardly be claimed as the basis of a "lockout" where it was admitted the workmen could have driven to work in their own cars, as many of them had done prior to the discontinuance of the bus service on March 22, 1956 (Tr. 426).

The temper and attitude of the Appellant Unions was well stated by Mr. Rossman as follows (Tr. 653):

"Q. Well, you were insisting that all the terms

and provisions of the Hanford Agreement were in effect. Were you also recognizing the grievance and arbitration procedures, if such there be, under the Hanford Works Agreement, or did you just want the good part and leave the bad out?

A. I repeatedly stated that I couldn't agree to any settlement that would provide for a cut in take-home pay for my members employed on that project.

Q. You made that statement repeatedly, didn't you ?

A. Many times.

Q. That regardless of what the contract said, you weren't going to take any cut in pay?

A. That's right."

In connection with this Specification of Error, it is interesting to note that Appellant Teamsters' counsel, Mr. Carey, by his answer to a question of the Court, recognized the work stoppage as a strike and not a "lockout" (Tr. 296):

> "Mr. Carey: Prior to the beginning of the strike on March 22nd. The strike started on March 22nd."

It is also of interest to note the signs carried by the pickets did not indicate a lockout, but rather a strike by their language (Tr. 410):

> "A. Oh, it said 'Hanford Contractors Unfair to Teamsters Union,' such and such, 'Operators Union' number such and such, and 'Cement Finishers.' It may not have been in that order."

In the light of all of the foregoing, it is submitted Specification of Error III-C is entirely without merit and not worthy of consideration.

SPECIFICATION OF ERROR IV

By this Specification of Error, the Appellants object to the form of the Judgment against them as being "joint and several."

The answer to this contention is that the Judgment as finally entered and as appealed from does not so provide. Rather, it reads (Tr. 173-174):

> "It Is Further Ordered, Adjudged and Decreed that the last paragraph of the Judgment entered herein April 14, 1958, be, and the same is hereby amended and changed to read as follows:
>
> " 'It Is Further Ordered, Adjudged and Decreed, that Morrison-Knudsen Company, Inc., a corporation, plaintiff herein, is hereby granted judgment against each of said defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, in the sum of $147,284.41, together with interest thereon at the rate of 6% per annum from the date of entry of this judgment until paid, together with costs and disbursements of plaintiff to be taxed against each of said defendants in the manner as provided by law. It Is Further Ordered that the satisfaction of said judgment against either defendant shall automatically operate as a *pro tanto* satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect from said defendants, either individually or jointly, more than the total amount of the judgment, interest, and costs as aforesaid.' "

Next, the Appellants argue that the Judgment as above set forth is improper for the reason that there was no segregation of or basis for the segregation between

them of the damages sustained by Appellee by reason of the simultaneous and illegal strike of Appellants. It is submitted under the facts and evidence of this case, not only is no such segregation necessary but any such attempt at segregation would be improper.

Upon the termination of the Hanford Works Agreement on December 31, 1955, Appellants each took the position that the Area Agreements negotiated prior thereto and dated December 19, 1955 (Ex. 2) and December 24, 1955 (Ex. 3) respectively, did not cover and were not applicable to the Hanford Works Area (Tr. 331, 332). They each refused to submit the matters in dispute to arbitration as provided for by the Area Agreements, Exhibits 2 and 3 (Tr. 335). At the meeting of March 16, 1956, the Appellants affirmed that their members would not go to work if the busses were taken off (Tr. 336, 342, 343). When the busses were not furnished on March 22, 1956, Appellants made good on their threats, and the work stoppage occurred (Tr. 343). The establishment of pickets on April 5, 1956 was jointly by the Teamsters, Operating Engineers and Cement Finishers (Tr. 410). The record is uniform in establishing that in all acts leading up to, during and continuing to and including the end of the strike, the Appellants acted in concert and jointly. Based upon such undisputed facts, the Court found as Finding of Fact VII (Tr. 134, 135):

> "That upon the termination of the Hanford Works Agreement (Defendants' Exhibit 16), the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370, jointly and severally de-

manded of Plaintiff, through its authorized bargaining agent and representative Associated General Contractors of America, Inc., Spokane Chapter, the continuance of furnishing by Plaintiff of free bus transportation from the North Richland Bus Terminal to the site of the work within the Hanford Atomic Products Operation area for their members employed by Plaintiff, although the furnishing of such free bus transportation had never been a contractual requirement of any Labor Agreement covering the work at Hanford Works, and further demanded the payment to their members employed by Plaintiff of isolation pay, as provided for by the terminated Hanford Works Agreement, and refused to recognize the applicability of the Labor Agreements, Plaintiff's Exhibits 2 and 3, to the work of Plaintiff within the Hanford Works Area for the Atomic Energy Commission although said work was being carried on wholly within Benton County, Washington. Although Plaintiff, through its authorized bargaining agent and representative, Associated General Contractors of America, Inc., Spokane Chapter, offered to submit the applicability of said Labor Agreements, Plaintiff's Exhibits 2 and 3, to the Hanford Works Area and the questions of the furnishing of free bus transportation and of isolation pay for hearing and arbitration in accordance with the grievance machinery, as set forth and established by Article IX of Plaintiff's Exhibit 2 and Article X of Plaintiff's Exhibit 3, the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 refused to submit such matters under the grievance machinery, as set forth in said Labor Agreements, disclaimed the applicability of Plaintiff's Exhibits 2 and 3 to the work of the Plaintiff within the Han-

> ford Works Area and on March 22, 1956, upon the discontinuance by Plaintiff of the furnishing of free bus transportation and of isolation pay to the members of the Defendant Local Unions then in the employ of Plaintiff, said Defendant Teamsters Local No. 839 and Defendant Operating Engineers Local No. 370, acting in concert, caused their respective membership to strike the work of Plaintiff under its Contract, Plaintiff's Exhibit 1, with the Atomic Energy Commission and to cease all work thereon or for Plaintiff and on April 5, 1956, caused the work of Plaintiff to be picketed, which strike and refusal to work continued to and until the 6th day of June, 1956."

Under the circumstances, it must be clear that for all damages sustained by Appellee, each of Appellants was liable to the full extent. There was and is no possible basis to contend that any portion of the damages were more the result of the acts of one Appellant than the other. There was no showing that either Appellant ever elected to or offered to end the strike on its part. In fact the record is to the contrary. There was and is therefore no reason or basis for segregating the damages between the two Appellants. Obviously, Appellee could not be left in the position of collecting its full damages from each of Appellants and the Judgment expressly provides against such contingency.

We have no quarrel with the authorities cited by Appellants under this Specification of Error. It is admitted that the joinder of Appellants in a single action was permissible under applicable Federal Rules of Civil Procedure. The Judgment as entered was and is against each

of the Appellants "according to their respective liabilities," and is therefore entirely proper.

We cannot leave this point without directing the attention of the Court to the logical, or more properly stated "illogical," situation which would result if Appellants' contention were to be sustained. Should this be done, the Court would have placed in the hands of Labor Unions the power to completely render ineffective the provisions of the Taft-Hartley Act giving the employer the right of direct action against Labor Unions for breach of Contract. To eliminate any possible liability for damages for breach of Contract, it would then only be necessary for two Unions to join in a strike or breach of identical provisions of a Contract and then escape liability for damages by the contention that it was not possible to segregate what portion of the damages of the employer were occasioned by the act of one of the collaborating Labor Unions and what portion was caused by the act of the other collaborator. Any such a result would be not only contrary to the clear intent of the Taft-Hartley Act but contrary to all rules of justice.

Specification of Error IV is as much without foundation in fact or law and as without merit as each of the other Specifications of Error relied upon by Appellants.

SPECIFICATION OF ERROR V

Although Appellants, by Specification of Error V, took exception to the damages as awarded by the Court under Items 1, 8, 11, 12 and 16, they have elected to discuss only Items 8, 11, 12 and 16 upon this Appeal. As to these latter Items, they contend the allowances made by

the Court were "excessive and not supported by the evidence."

Appellants predicate their argument largely upon the novel theory that since Appellee "would have sustained loss on the contract" in any event they are entitled to a free ride and should not have been charged any amount to diminish such loss.

This argument is not only novel and illogical, but also not strictly in accordance with facts.

By Exhibit 1 it was established that Appellee's Contract with the Atomic Energy Commission called for the performance of the following work at lump sum prices, as follows:

Item No.	*Description*	*Amount*
1	Pumping Plant Addition 100-F Area	$ 908,380.00
2	Pumping Plant Addition 100-H Area	868,800.00
3	Office Addition and Modification of Vent Rooms—100-D Area	20,400.00
4	Office Addition and Modification of Vent Rooms—100-D Area	20,400.00
5	Office Addition and Modification of Vent Rooms—100-F Area	51,600.00
	TOTAL	$1,869,580.00

Admittedly these prices covered and included Appellee's contemplated or anticipated profit on the Project (Tr. 946).

Mr. Ralph Nelson, Office Manager upon the Project, testified that the book loss as of December 31, 1957, was $322,196.93 (Tr. 942) against which would have to be

offset any recovery received from the Atomic Energy Commission from a claim of $127,483.55 (Tr. 978) and any recovery from Appellants. Mr. Russell H. Madsen, Assistant Division Manager for Appellee, testified when these two elements were taken into consideration "it would be questionable whether we would be in the black or in the red" (Tr. 1010). Accordingly Appellants' contention that the Project "would have sustained loss" is not consistent with the facts.

Regardless of the truth or falsity of this contention the argument of Appellants is illogical and unsound. We will demonstrate this fact during the course of the discussion of the separate items to which Appellants take exception.

Item 8 — Equipment Rentals — $18,938.82

As to this item Appellants seek to take advantage of an inter-company charge as made by the District Office of Appellee to each of its Projects for equipment rental instead of the allowance of a fair rental value for the equipment rendered inoperative by the strike as allowed by the Court (See Appellants' Brief page 62).

While it is conceded the charge made by Appellee to the Project for its own equipment might have some probative value, it could not be controlling of a fair rental value. Obviously the only reason Appellants seek to take advantage of such amount is that it was low and without relation to actual fair rental value. Had the inter-company charge been greater than fair rental value we have no doubt Appellants would be here insisting that fair rental value should govern their liability.

We direct the attention of the Court to Exhibit 29 whereon is listed the equipment made idle by Appellants' wrongful strike. The testimony was that the only charge made by the District Office of Appellee to the Project for the use of this equipment throughout the entire strike period was $689.35 (Tr. 989, 990) for the reason that no charge was made during this period, except for pickups (Tr. 1019), in order to prevent the management of the Project from losing interest in the work (Tr. 1019).

The fact is the claim of Appellee of $27,043.13 was based upon AGC and AED rental rates, which the testimony established were accepted as standard in the construction industry. J. P. Finlay (Tr. 983, 984). R. H. Madsen (Tr. 1018). Ramon E. Reed (Tr. 809). Ralph Nelson (Tr. 917-921).

The Trial Court saw fit to reduce the amount of the claim of Appellant under this item to $18,938.82 consistent with the holding in *Brand Inv. Co. v. United States,* 58 F.Supp. 749, 102 Ct. Cl. 853, Certiorari denied, 324 U.S. 850, 89 L.ed. 1410, where the Court stated:

> "(4, 5) The other disputed element of damage is the rental value of machines and equipment which the plaintiff had on the job, and which were necessarily kept idle during the period of the stop order. The plaintiff proved that machines of this type had a certain rental value. The Government urges that the plaintiff was not in the business of renting machines to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not shown that it had any

other job on which it could have used them itself if they had not been tied to this job.

We think that the plaintiff is entitled to recover on this item of its claim. We do not allow the full amount of the rental value, since we recognize that, if rented, the machines would have suffered wear and tear which they did not suffer while idle on this job. But when the Government, in breach of its contract, in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness, we think that it should make compensation comparable to what would be required if it took the machines for use for a temporary period, but did not in fact use them."

The finding of the Trial Court as to the amount of damages sustained by the Appellee for the loss of use of its equipment is in accordance with law and established facts of this case and should be sustained.

Item 12 — General Administrative Expense — $17,331.30

In *Brand Inv. Co. v. United States,* 58 F.Supp. 749, 102 Ct. Cl. 853, heretofore mentioned, the Court also had occasion to comment upon the recovery of General Administrative Expense in a situation such as here exists stating:

"(2, 3) We are allowing the plaintiff a proportionate part of its main office overhead. While such an element of damage can never be proved with mathematical precision, it is standard accounting practice to attribute main office expense to various company operations on some fair basis and we follow that practice."

The accounting and factual basis for Item 12 was

testified to by Ramon E. Reed, Project Manager for Appellee (Tr. 814-817). He stated the item was to cover the expense of the Home Office at Boise, Idaho and the District Office at Seattle, Washington, and that in practice each Project of Appellee is charged 3% upon the entire job revenue to cover such General Administrative Expenses (Tr. 815-816). To arrive at a basis for the claim in this case the originally scheduled revenue of $702,380.00 for the months of April, May and June was used and there was deducted therefrom $104,972.00 as the actual revenue received during the period and the remainder of $597,608.00 was divided by the 91 days in April, May and June to arrive at a daily average loss of revenue of $6,550.00. This figure was then multiplied by the 98 days' delay to the progress of the work attributable to the strike and in turn the product was multiplied by 3% to produce the General Administrative Expense charge for the period of 98 days (See Exhibit 30).

Appellants' Auditor, George E. King, admitted that General Administrative Expense must be allocated upon some formula (Tr. 1091, 1092).

The gravamen of Appellants' complaint seems to be that the Court adopted Appellee's formula that the General Administrative Expense should be computed upon the basis of "average daily scheduled revenue" rather than the formula contended for by Appellants of a computed "average daily basis" from actual revenue received.

The first answer to Appellants' contention is that their own Auditor, George E. King, admitted his computation was not consistent with fact (Tr. 1105):

"Q. Yes, but it was not received on an average daily basis, was it, it was received on an actual basis of progress which was not average at all, that is correct, isn't it? A. That is right."

The second answer is that to adopt Appellants' theory and that espoused by their Auditor, George E. King, would be to permit Appellants to profit from their own wrong. Since it was admitted revenue was entirely dependent upon job progress (Tr. 1105) and all progress was stopped by the strike, which also stopped revenue, the logic of Appellants' contention would be to deny that Administrative Expense continued during the strike period since there would be no actual revenue received upon which to compute a percentage for General Administrative Expense purposes. The argument falls of its own weight.

Appellants concede the rule of law that an action for the recovery of damages does not fail merely because the amount of damages sustained is incapable of exact measurement. *Ball v. Stokely Foods, Inc.,* 37 Wn.(2d) 79, 221 P.(2d) 832; *Dunseath v. Hallauer,* 41 Wn.(2d) 895, 253 P.(2d) 408; *Gaasland Co. v. Hyak Lbr. Etc.,* 42 Wn.(2d) 705, 257 P.(2d) 784; *Sund v. Keating,* 43 Wn. (2d) 36, 259 P.(2d) 1113; *Gilmartin v. Stevens Inv. Co.,* 43 Wn.(2d) 289, 261 P.(2d) 73, and *Hartman v. Anderson,* 49 Wn.(2d) 154, 298 P.(2d) 1103.

Here the Appellee presented to the Trial Court a fair and equitable method of and basis for computation of General Administrative Expense and it was adopted by the Trial Court. The Specification of Error as to this item is without merit.

Item 16 — Efficiency Loss for Labor and Extra Cost Materials — $75,933.89

To demonstrate and establish the loss resulting to Appellee from the enforced shut down of operations occasioned by the strike the Appellee, through Exhibit 33 and testimony in support thereof, computed the labor cost per cubic yard of concrete prior to the strike and after the strike and claimed the difference by way of damages.

The reasons for the excess labor costs after the strike were testified to by Ramon E. Reed, Project Manager for Appellee. He stated that upon starting up a job it takes several days for new men to get to working as a unit even though experts in their crafts. He compared a concrete crew to an All American football team and explained that it takes time for such a group to form a championship outfit (Tr. 823). He further stated that at the time of the strike the crews were trained and the initial lag had been overcome, but it was found impossible after the strike to secure the return of the same workmen (Tr. 804, 805). The best carpenters were not available and the majority of them had found work elsewhere and as a result a poor group of carpenters were on the Project subsequent to the strike (Tr. 806, 825). Mr. Reed further stated that due to the delay in the work caused by the strike the Atomic Energy Commission put pressure upon Appellee, which necessitated the employment of additional help to get the work back on schedule (Tr. 825). All of these factors served to increase the cost and in Area 100-F where the labor costs prior to the strike had been $28.41 per cubic yard it rose to $39.71 per

cubic yard after the strike. Similarly where the labor cost prior to the strike in 100-H Area had been $20.91 per cubic yard it rose to $42.92 subsequent to the strike (Ex. 33). These differences accounted for $67,288.91 additional labor costs to Appellee upon concrete alone after June 6, 1956, when work was resumed (Ex. 33).

But labor costs were not the only item of additional expense resulting from the strike. The cost of materials was also increased. Mr. Reed stated this increase was occasioned in part by inability to reuse forms as would have been possible and as had been anticipated except for the strike and the resulting necessity to speed up the work to meet demands of the Atomic Energy Commission (Tr. 818). The increase in cost was further occasioned by the necessity for building additional forms out of plywood instead of using patented forms (Tr. 825) and by the loss of forms and materials due to drying out and warping during the strike shut down (Tr. 826).

To reflect these additional material costs there was contrasted on Exhibit 33 the estimated material cost per cubic yard with the actual cost and it was found that this difference was $22,082.07.

Thus the total excess labor and material costs as claimed by Appellee and as supported by the evidence attributable to the strike was $89,370.98, upon which the Trial Court, for reasons best known to it, allowed $73,-933.80.

It is submitted the method of computing damages as employed by Appellee was fair and equitable and that the allowance made by the Court was well within the evi-

dence. Accordingly the Specification of Error as to this item is without merit.

Item 11 — Loss of Profits — $5,936.29

After determining the specific items of damage sustained by Appellee the Court, by Supplemental Findings of Fact I (Tr. 143), found:

> "and that Plaintiff is further entitled to an allowance upon said direct cost, expense and damage Items 1, 2, 8, 10, 12, 15 and 17, totaling $59,362.95 of a reasonable markup or profit of 10% or—$5,-936.29."

By this Finding the Court allowed Appellee only reimbursement for direct expense incurred, except as to (1) Overhead Salaries, (2) Office Rent, Furnishings and Engineering Equipment, (8) Equipment Rentals, (10) Interest on Invested Capital, (12) General Administrative Expense, (15) Extended Time Maintaining General Electric Company Offices and (17) Status Quo Transportation and Isolation Pay.

As previously stated, the complaint of Appellants as to this allowance is that since Appellee had been forced into a loss position on the contract with the Atomic Energy Commission (Ex. 1) Appellee was entitled to no allowance for profit as a part of damages sustained by it upon the direct expense to which it had been subjected by the wrongful act of Appellants. We regard this contention as a *non sequitur*.

Even if it be conceded that Appellee sustained a loss upon the over-all performance of the entire Atomic Energy Commission Contract, it does not follow that each and every part of the work was performed without

profit. It was explained by Mr. Madsen that $127,483.55 of the apparent loss was occasioned by an error in the bid of the University Plumbing & Heating Company, as a Subcontractor (Tr. 1040-1042). The claimed loss due to the acts of Appellants and which Appellee was able to itemize and support by direct proof was $182,515.77 (Ex. 49), upon which the Court allowed only $147,-284.41 (Tr. 143). These two items account for approximately $300,000.00 of the loss which was reflected by the books as of December 31, 1957, and who is to dispute that had it not been for the unlawful and wrongful acts of Appellants the Appellee would have made a profit upon the Project, rather than have sustained a loss.

Here Ralph Nelson, Project Office Manager, testified that the normal mark up of direct costs in the construction industry is 15% for overhead and 10% for profit (Tr. 938). Russell H. Madsen testified to the same effect (Tr. 1030). He further testified that such an allowance for overhead and profit is generally accepted as proper on extra work performed for Governmental Agencies such as the Army, Navy, Air Force, Atomic Energy Commission and Bureau of Reclamation (Tr. 1030) and that such an allowance was actually received upon extra work performed for the Atomic Energy Commission under Exhibit 1 (Tr. 1030). Accordingly the allowance by the Court was not a fanciful or unsupportable figure, but one based upon uncontradicted testimony and supported by custom and practice in the construction industry.

The Specification of Error as to this item is without

merit and the allowance of the Trial Court for damages should be sustained.

When considered in the light of the evidence and the facts, it is respectfully submitted that the allowances for damages, as made by the Trial Court, were proper, are fully supported by the evidence and that the entire Specification of Error V is without substantial foundation or merit. The award of damages in the amount of $147,284.41 should be sustained and affirmed.

SPECIFICATIONS OF ERROR VII, VIII, AND IX

As indicated by Appellants' Brief, these Specifications of Error relate to the refusal of the Trial Court to accept the proposed Findings of Fact and Conclusions of Law offered by Appellants which would have required exactly the opposite result from that found by the Trial Court.

For the reason that the argument presented upon the other Specifications of Error completely cover the points as raised by the proposed Findings and Conclusions, we do not deem it necessary to deal separately with Specifications of Error VII, VIII and IX.

CONCLUSION

Each of the Specifications of Error as asserted by Appellants has been shown to be without merit or legal support.

The Findings of the Trial Court disposed of each factual issue as presented by Appellants favorable to Appellee and not only have Appellants been unable to point out wherein such Findings are unsupported by the evi-

dence but Appellee has demonstrated, by reference to the record, that such Findings are consistent with the evidence and overwhelmingly supported thereby.

Notwithstanding all of Appellants' attempts to avoid the impact of the Judgment in this case there stand out as irrefutable facts the following :

Appellants each had binding Contracts with Appellee made through the agency of The Associated General Contractors of America, Inc., Spokane Chapter, expressly and specifically covering all work within Benton, Franklin, Grant and Yakima Counties of the State of Washington, wherein lay the Hanford Works Area.

Appellants refused to honor such Contracts as applicable to the work of Appellee within the Hanford Works Area because they did not provide for "isolation pay" and "bus transportation," although bus transportation had never been a contractual obligation of Appellee or any other employer, and to enforce their unlawful demands struck the work of Appellee in violation of their contractual agreements that "there shall be no strikes."

By reason of the strike of Appellants' members the work of Appellee was brought to a standstill from March 22, 1956, to June 6, 1956, resulting in damages, as claimed by Appellee at time of trial of $182,515.77, and as allowed by the Trial Court of $147,284.41. These damages were well and adequately supported and substantiated by the evidence.

To evade responsibility for all of the foregoing Appellants are urging this Court to declare, as a matter of law, that the entire Hanford Works Area (some 400,000

acres of land) is not and never has been, since the condemnation proceedings by the United States in 1943, a part of the State of Washington. This is notwithstanding the specific refusal and declination of the United States to accept any jurisdiction over the area and the continuous exercise of jurisdiction over the area by the State of Washington in all particulars, except as to the right to tax the property of the United States. Not only is the argument and contention of Appellants without factual or legal support, but it lacks one further vital factor. The Contracts between Appellants and Appellee (Exhibits 2 and 3) expressly negative the idea that they were entered into with any such distinction, as claimed by Appellants, within the contemplation of the parties.

For all of the reasons as heretofore set forth, the Judgment of the lower Court should be affirmed in all respects.

Respectfully submitted,

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